

## BEACH USE AGREEMENT

This Beach Use Agreement (this “Agreement”), in conjunction with a stipulated judgment between the parties (the “Stipulation”) entered in *Almeder v. Town of Kennebunkport*, Docket No. RE-09-111, the terms of which are incorporated herein by reference, is entered into on the following terms:

### 1. PARTIES:

The parties to this Agreement are: (1) the Town of Kennebunkport, a Maine municipal corporation located in Kennebunkport, Maine, whose address is 6 Elm Street, Kennebunkport, Maine 04046 (the “Town”); (2) the owners of properties on the beach commonly known as Goose Rocks Beach (the “Beach”) located in Kennebunkport, Maine, being the owners listed in Schedule A attached hereto and made a part hereof, whose property addresses are set forth in said Schedule A, and any owner of property on the Beach who subsequently joins in this Agreement pursuant to Paragraph 13 hereof (collectively, the “Beachfront Owners”); and (3) the owners of properties located in the vicinity of, but not on, the Beach, being the owners listed in Schedule B attached hereto and made a part hereof, whose property addresses are set forth in said Schedule B, who claim rights in and to the use of the Beach in *Almeder v. Town of Kennebunkport*, Docket No. RE-09-111 (the “Back Lot Owners”).

### 2. PREMISES:

The premises to which this Agreement relates (the “Premises”) comprise those portions of the Beach extending seaward from the seawall or vegetation/landscape to the low water mark of the Atlantic Ocean and located adjacent to each of the Beachfront Owners’ upland properties situated at the addresses set forth in said Schedule A (the “Upland Properties” or “Upland Property,” as the case may be), reference being made to the Beachfront Owners’ deeds also listed in said Schedule A.

### 3. TERM:

Following the effective date of this Agreement as hereinafter defined in Paragraph 12, and except as otherwise provided herein, this Agreement shall remain in full force and effect unless terminated in accordance with the terms and provisions hereof.

#### 4. USE OF PREMISES:

The Town, the Back Lot Owners and their respective invitees/designees, including members of the general public, whether or not residents of the Town, shall have the non-exclusive right to use the Premises for active and passive recreational and recreational related purposes and activities customarily associated with, or conducted upon, beaches, including, without limitation, swimming, sunbathing, walking and typical “beachgoer” uses, provided such purposes and activities shall be undertaken in compliance with the Town’s Beach Use Ordinance following its adoption, as it may be amended from time to time (the “Beach Use Ordinance”), so long as the Beach Use Ordinance remains in effect as to the Premises or any portion thereof, and provided further that the Beachfront Owners shall have exclusive use of a twenty-five (25) foot strip of land measured in width extending from the seawall or vegetation/landscape line towards the Atlantic Ocean extending across the full length of their seaward property boundary, as measured at the seawall or vegetation/landscape line (“Reserved Area”), provided that:

- a. Beachfront Owners desiring exclusive use of the Reserved Area shall, by appropriate means identified in the Beach Use Ordinance or otherwise determined by the Beach Advisory Committee or any successor to said Committee, indicate that for any given day or time of day or for such other reasonable time period designated by the Beachfront Owner, such Reserved Area is reserved for the exclusive use of the Beachfront Owner;
- b. for properties where the Reserved Area extends below the high water mark into the intertidal zone, the Reserved Area will be reduced to ten (10) feet in width for one (1) hour before high tide until one (1) hour after high tide; and
- c. walking by the Town, the Back Lot Owners and their respective invitees/designees, including members of the general public, whether or not residents of the Town, shall be permitted within the Reserved Area at any time.

A Beachfront Owner’s decision to permit use of the Reserved Area by the public, the Back Lot Owners or others as provided herein for any length of time during the period that this Agreement is in effect shall not preclude a Beachfront Owner from subsequently making exclusive use of the Reserved Area at such times as the Beachfront Owner shall elect in accordance with the procedure set forth above, except for walking rights provided in subparagraph c. above.

#### 5. TOWN OBLIGATIONS:

The Town hereby agrees to: (1) following the execution of this Agreement by the parties, draft a Beach Use Ordinance that contains provisions no less restrictive than those listed on Schedule C attached hereto and made a part hereof and use its best efforts to cause its adoption at a duly held Town Meeting on or before August 20, 2012 or on such date thereafter to which the parties may agree; (2) following the effective date of this Agreement, commit appropriate municipal resources necessary to ensure reasonable

enforcement of the provisions of the Beach Use Ordinance, including, but not limited to enforcement of the exclusive use of the above-referenced Reserved Area by Beachfront Owners who have requested such enforcement by the Town; (3) following the effective date of this Agreement, adopt and maintain parking regulations for access to the Premises that, at a minimum, restrict the number of available parking spaces designated for access to the Premises to no more than 173 parking spaces; (4) following the effective date of this Agreement, establish a standing advisory committee (the “Beach Advisory Committee”), the membership and duties of which shall be as outlined in Schedule D attached hereto and made a part hereof; and (5) following the effective date of this Agreement, not propose future changes to the Town’s Land Use Ordinance that would have the effect of permitting commercial uses not currently allowed or other new uses that would increase current housing densities in the vicinity of the Beach, if such proposed changes would materially intensify the use of the Beach in a manner or to an extent that would materially change the character of the Beach. Notwithstanding the foregoing, changes in zoning or other Town regulations relating to the Beach that are proposed by the Town based upon the recommendation of the Beach Advisory Committee shall not be deemed to violate the Town’s obligations under this Agreement.

6. PAYMENT:

Within thirty (30) days of the effective date of this Agreement, or on such later date that such funds are appropriated, the Town shall pay the sum of \$2,000 into a dedicated Town fund (the “Beach Maintenance Fund”) for each Upland Property whose owners execute this Agreement, which Beach Maintenance Fund shall be maintained and used exclusively for beach maintenance and improvement and enforcement of beach regulations as determined by the Town in consultation with the Beach Advisory Committee.

7. TOWN WAIVER:

Upon the effective date of this Agreement, the Town shall be deemed to have waived and released to the Beachfront Owners any claim of title to and/or prescriptive easement in the Premises and be deemed to have agreed not to assert any such claims against the Beachfront Owners.

8. TERMINATION OR SUSPENSION AS TO PUBLIC USE:

This Agreement may be terminated or suspended as against the Town with respect to public use of the Premises and/or any portion of the Premises adjacent to an individual Beachfront Owner’s Upland Property as follows:

- a. *Notice of Intent to Suspend or Terminate Public Use Rights:* A Beachfront Owner may at any time give the Town written notice of intent to terminate or suspend public use rights in any portion of the Premises adjacent to the Beachfront Owner’s Upland Property. Said notice shall specify in detail the reasons for the intended termination or suspension and the action requested of the Town and shall

be sent to the Town Manager. The termination or suspension shall take effect either when a court issues a final judgment declaring termination or suspension as stated in subparagraph c. below, or when an arbitration panel awards a suspension for up to one (1) year as stated in subparagraph d. below.

- b. *Grounds for Termination or Suspension:* Public use rights may be suspended or terminated if, despite being on notice of such violations, the Town repeatedly and consistently fails or refuses to enforce violations of the Beach Use Ordinance that occur on the portion of the Premises adjacent to that Beachfront Owner's Upland Property or that cause that Beachfront Owner a material and substantial loss of the right to the quiet enjoyment of that portion of the Premises, whether or not the violation occurred on that portion of the Premises. Whether public use rights are suspended or terminated depends on the extent of the Town's failure to enforce, the sufficiency of notice to the Town, the degree of the Town's fault, and any other factors relevant to the determination.
- c. *Judicial Remedy:* No sooner than 45 days after sending the written notice in subparagraph a. above, unless the Town has cured such failure or refusal to enforce said violation(s) of the Beach Use Ordinance within said 45 day period, the Beachfront Owner may commence an action in any court of record having jurisdiction and venue seeking a declaratory judgment that public use rights in the portion of the Premises adjacent to that Beachfront Owner's Upland Property covered in the written notice have been terminated or suspended. The court may grant or deny the request for relief or award relief different than requested. Any declaratory judgment terminating or suspending public use rights declared by the court shall take effect when the judgment becomes final by virtue of exhaustion or expiration of rights of appeal. Claims of multiple beachfront owners may be consolidated should the court so determine. If at least 51% of all Beachfront Owners (including non-signatory owners) bring claims under this Paragraph 8 and if those claims are consolidated, the court may declare public use rights in the entire Premises terminated or suspended.
- d. *Arbitration Remedy for Limited Suspension:* If the Beachfront Owner is willing to limit any suspension of public use rights in the portion of the Premises adjacent to that Beachfront Owner's Upland Property to no more than one (1) year, the Town agrees to submit the Beachfront Owner's claim to binding arbitration under the following procedure:
  - i. The Owner may demand arbitration only after 45 days after sending written notice under subparagraph a. above.
  - ii. The Beachfront Owner and the Town shall each select one arbitrator, and the two selected arbitrators shall choose a third. A majority of the three shall decide the award.

- iii. Compensation, if any, for the arbitrators shall be determined by the Beach Advisory Committee and may, if the Committee so decides, be paid from the Beach Maintenance Fund, so long as such Fund shall remain in effect, provided that the Owner(s) demanding arbitration shall prevail in the arbitration proceeding; otherwise, such compensation shall be paid by the non-prevailing Owner(s).
  - iv. Unless the parties agree otherwise, the arbitration shall be held according to the American Arbitration Association Commercial Arbitration Rules, with the goal of providing a simple, speedy, inexpensive dispute resolution procedure.
  - v. The arbitrators are authorized to deny a suspension, or to award a suspension of public use rights for any period of up to one (1) year, and not longer.
  - vi. Any suspension ordered by the arbitrators is effective when ordered, regardless of any appeal.
  - vii. The arbitrators' decision is final and may be appealed only for fraud, corruption, evident and material bias, or for an award in excess of the arbitrators' authority, as provided in the Maine Arbitration Act.
  - viii. Claims of multiple beachfront owners may be consolidated should the arbitrators so determine. If at least 51% of all Beachfront Owners (including non-signatory owners) bring claims under this Paragraph 8 and if those claims are consolidated, the arbitrators may declare public use rights in the entire Premises suspended for any period up to one (1) year.
- e. *Effect of Termination or Suspension:* In the event of a termination or suspension of this Agreement as against the Town with respect to public use of all or any portion of the Premises as provided in this Paragraph 8, the Town shall have no further right or obligation to enforce the Beach Use Ordinance as to any portion of the Premises in which public use rights under this Agreement have been terminated or suspended, and the Beach Use Ordinance shall no longer be applicable to said portion of the Premises. In the case of a suspension of public use rights, the Town's duty and obligation to enforce shall be reinstated when the public use rights are reinstated. The rights of the Beachfront Owners and the Back Lot Owners under this Agreement shall, however, not be affected by a termination of this Agreement under this Paragraph 8 as against the Town with respect to public use of the Premises or any portion thereof, which rights of the Beachfront Owners and the Back Lot Owners shall remain in full force and effect and exercisable in accordance with the terms and conditions hereof except that, as to the Beach Use Ordinance, the Beachfront Owners and the Back Lot Owners acknowledge and agree that the use of the Premises by the Back Lot Owners shall be subject to and in accordance with only those provisions of the Beach Use Ordinance that relate to and govern the use of the Premises by the general public

and such other reasonable rules and regulations governing the use of the Premises as shall be agreed upon by the Beachfront Owners and the Back Lot Owners including, but not limited to, a newly reconstituted Beach Advisory Committee with the same voting and membership provisions as listed in Schedule D attached hereto and made a part hereof, except that the at-large community member and selectman member shall each be replaced by a Back Lot Owner.

9. BACK LOT OWNER WAIVER:

Upon the effective date of this Agreement, the Back Lot Owners shall be deemed to have waived and released to the Beachfront Owners any claim of prescriptive easement in the Premises. The Back Lot Owners shall not, however, be required to waive and release any rights they have in and to any private access points to the Premises acquired by conveyance or otherwise and nothing in this Agreement shall be deemed to extinguish or extend such rights.

10. TERMINATION OR SUSPENSION AS TO BACK LOT OWNER:

If an individual Back Lot Owner causes a Beachfront Owner a material and substantial loss of the right to the quiet enjoyment of the portion of the Premises adjacent to that Beachfront Owner's Upland Property, whether or not the Back Lot Owner's activity occurred on that portion of the Premises, the rights of the breaching Back Lot Owner in and to the use of that that portion of the Premises as provided in this Agreement may be terminated or suspended as to the breaching Back Lot Owner following the procedure set forth in Paragraph 8 above regarding termination or suspension of the Town's public use rights hereunder. A termination or suspension of this Agreement as against the Back Lot Owner with respect to the Back Lot Owner's use of the portion of the Premises adjacent to the Beachfront Owner's Upland Property shall not, however, terminate or suspend this Agreement as against the Back Lot Owner with respect to the Back Lot Owner's use of all or any portion of the Premises other than that portion of the Premises adjacent to the Beachfront Owner's Upland Property. In the event of a suspension of this Agreement as against a Back Lot Owner with respect to the use of all or any portion of the Premises adjacent to a Beachfront Owner's Upland Property as provided in this Paragraph 10, such suspension shall end at such time as the Back Lot Owner ceases the activity that resulted in such suspension.

11. OPT OUT RIGHTS:

Notwithstanding anything to the contrary set forth in this Agreement, Beachfront Owners and Back Lot Owners shall have the right, to be exercised within three (3) days following the adoption of the Beach Use Ordinance at a duly held Town Meeting, to opt out of this Agreement by written notice to the Town, in which event said opting out party shall be removed as a party to this Agreement and shall have no further rights or obligations hereunder.

12. EFFECTIVE DATE OF THIS AGREEMENT:

Except as may be otherwise provided herein, this Agreement shall not be effective until (a) the execution of this Agreement by the Board of Selectmen of the Town, (b) the execution of this Agreement by owners of not less than sixty (60) of the lots fronting the Beach, (c) the approval of this Agreement at a duly held Town Meeting, and (d) the expiration of the opt out period provided for in Paragraph 11 above. Notwithstanding the foregoing, however, this Agreement shall not take effect unless, following the expiration of the opt out period provided for in Paragraph 11 above, Beachfront Owners of no fewer than fifty (50) beachfront lots remain parties to this Agreement. Within five (5) days of the effective date of this Agreement, the Stipulation shall be filed with the York County Superior Court.

13. JOINDER BY OTHER OWNERS:

Nothing in this Agreement shall be deemed to prevent any owner of property located on the Beach from seeking to join in this Agreement following its effective date by supplemental agreement executed by said owner and the Town and duly recorded in the said Registry of Deeds, provided, however, that the Town, shall not be required, and shall have no obligation, to enter into any such supplemental agreement. Any such owner of property located on the Beach who joins in this Agreement as provided in this Paragraph 13 shall be deemed a Beachfront Owner and shall be subject to, and shall have the benefit of, all terms and provisions hereof as if said owner had been a party to this Agreement and the Stipulation as of the date hereof.

14. RELATIONSHIP OF BEACHFRONT OWNERS AND BACK LOT OWNERS:

This Agreement, as it pertains to the relationship between the Beachfront Owners and the Back Lot Owners, is subject only to the terms and provisions of this Agreement without regard to any acts of, or any omission or commission by, the Town. No default by the Town, no actions of the general public and no failure of the Town relating to the Beach Use Ordinance shall affect or impair the rights and obligations as between the Beachfront Owners and the Back Lot Owners under this Agreement.

15. MISCELLANEOUS:

(1) This Agreement shall run with the properties of the Beachfront Owners and the Back Lot Owners and shall be binding upon and inure to the benefit of the heirs, successors and assigns of the parties hereto.

(2) Any notice, demand and other communications hereunder shall be in writing and shall be deemed to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the second business day after mailing if mailed to the party to whom notice is to be given by first class mail, postage prepaid, registered or certified, return receipt requested, addressed to the party to whom notice is to be given at the address set forth above.

Any party may change its address for purposes hereof by giving the other parties notice of the new address in the manner described herein.

(3) Except as may be otherwise provided herein, this Agreement may not be modified, waived or amended except in a writing signed by (a) the Town, and (b) not less than sixty-seven percent (67%) of the Beachfront Owners and sixty-seven percent (67%) of the Back Lot Owners and duly recorded in the York County Registry of Deeds. No waiver of any breach or term hereof shall be effective unless made in writing signed by the party having the right to enforce such a breach, and no such waiver shall be construed as a waiver of any subsequent breach. No course of dealing or delay or omission on the part of any party in exercising any right or remedy shall operate as a waiver thereof or otherwise be prejudicial thereto.

(4) Any and all prior and contemporaneous discussions, undertakings, agreements and understandings of the parties are merged in this Agreement, which alone fully and completely expresses their entire agreement.

(5) If any term or provision of this Agreement or the application thereof to any person or circumstances shall, at any time or to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which this Agreement is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

(6) This Agreement shall be governed by and construed and enforced in accordance with the laws in effect in the State of Maine.

[End of Agreement. Execution Pages Follow.]



IN WITNESS WHEREOF, the Town of Kennebunkport, acting by and through its Board of Selectmen, hereunto duly authorized, the Beachfront Owners listed in Schedule A attached hereto and made a hereof and the Back Lot Owners listed in Schedule B attached hereto and made a part hereof, intending to be bound hereby, have hereby executed this Agreement as of the \_\_\_\_ day of \_\_\_\_\_, 2012.

WITNESS:

The Town of Kennebunkport

By its Board of Selectmen, hereunto  
duly authorized

\_\_\_\_\_

\_\_\_\_\_  
Sheila Matthews-Bull, Chair

\_\_\_\_\_

\_\_\_\_\_  
D. Michael Weston, Vice-Chair

\_\_\_\_\_

\_\_\_\_\_  
Stuart Barwise

\_\_\_\_\_

\_\_\_\_\_  
Allen A. Daggett

\_\_\_\_\_

\_\_\_\_\_  
Mathew J. Lanigan

STATE OF MAINE  
COUNTY OF YORK, ss.

\_\_\_\_\_, 2012

Then personally appeared the above-named Sheila Matthews-Bull, Chair of the Board of Selectmen of the Town of Kennebunkport, and acknowledged the foregoing instrument to be her free act and deed in her said capacity and the free act and deed of the Town of Kennebunkport.

Before me,

\_\_\_\_\_  
Notary Public/Attorney at Law

\_\_\_\_\_  
Print name

My commission expires \_\_\_\_\_

[Form of execution page for Beachfront Owner]

WITNESS:

\_\_\_\_\_

\_\_\_\_\_  
Beachfront Owner

\_\_\_\_\_  
Print name

\_\_\_\_\_

\_\_\_\_\_  
Beachfront Owner

\_\_\_\_\_  
Print name

STATE OF MAINE

COUNTY OF YORK, ss.

\_\_\_\_\_, 2012

Then personally appeared the above-named \_\_\_\_\_ and  
\_\_\_\_\_, and acknowledged the foregoing instrument to be their free act  
and deed.

Before me,

\_\_\_\_\_  
Notary Public/Attorney at Law

\_\_\_\_\_  
Print name

My commission expires \_\_\_\_\_

[Form of execution page for Back Lot Owner]

WITNESS:

\_\_\_\_\_

\_\_\_\_\_  
Back Lot Owner

\_\_\_\_\_  
Print name

\_\_\_\_\_

\_\_\_\_\_  
Back Lot Owner

\_\_\_\_\_  
Print name

STATE OF MAINE

COUNTY OF YORK, ss.

\_\_\_\_\_, 2012

Then personally appeared the above-named \_\_\_\_\_ and  
\_\_\_\_\_, and acknowledged the foregoing instrument to be their free act  
and deed.

Before me,

\_\_\_\_\_  
Notary Public/Attorney at Law

\_\_\_\_\_  
Print name

My commission expires \_\_\_\_\_

Schedule A

Beachfront Owners

Beachfront Owner

Property Address

Deed Reference(s)

Schedule B

Back Lot Owners

Back Lot Owner

Property Address

Deed Reference(s)

## Schedule C

### Beach Use Ordinance Provisions

The Beach Use Ordinance shall include:

Creation of:

- Beach Advisory Committee
- Beach Maintenance Fund
- Reserved Area for Owner's benefit

Prohibitions and/or Restrictions addressed by Ordinance:

- No alcohol or tobacco use on the Beach
- No overnight use of the Beach by the public
- Disorderly conduct, public indecency prohibited
- No littering
- No commercial soliciting
- No removal of sand, gravel or rocks
- Regulations governing domestic animals or pets (except that horses and horseback riding are regulated by horseback riding ordinance)
- Restrictions on tents on Beach
- Regulations to protect the environment, including, for example, signage to protect dune grass, marine life and wildlife on the Beach
- Parking regulations incorporated into Beach Use Ordinance (to include at minimum a cap on number of parking spaces as specified in Beach Use Agreement)
- Regulations prohibiting large-volume commercial vehicular drop off of public visitors at access points to Beach, such as by buses and trolleys
- Regulations governing time, number and location of permitted Beach fires
- Regulations limiting storage of watercraft, kayaks and other such equipment by non-Beachfront Owners to designated areas (such as Dinghy Point)
- Regulations governing appropriate unloading and launching of motorized boats on the Beach, which is limited to designated boat launching areas
- No organized mass gatherings or Town sponsored events except in designated areas of Beach or by permission of Owner(s)

Provision for:

- Acceptable level of staffing to ensure enforcement of Ordinance, which shall include at a minimum increased foot patrol enforcement of the Reserved Areas on a seasonal basis from June 15<sup>th</sup> through Labor Day.

## Schedule D

## Beach Advisory Committee

### I. Membership:

Beachfront Owners (4)

Back Lot Owners (2)

At-large community member (1)

Board of Selectman appointee (1)

### II. Duties:

- Assist in drafting and/or recommending proposed revisions to Beach Use Ordinance and proposed rules and regulations implementing the Beach Use Ordinance as necessary
- Advise as to expenditures from the Beach Maintenance Fund
- Review individual owner complaints for possible termination

### III. Voting, Elections:

- Beachfront Owner members to be elected by Beachfront Owners by vote, with each Beachfront Owner being given the number of votes equal to the number of beachfront lots owned by that Beachfront Owner in each election
- Back Lot Owner members to be elected by Back Lot Owners by vote, with each Back Lot Owner being given the number of votes equal to the number of back lots owned by that Back Lot Owner in each election
- At-large community member to be elected at a Town Meeting
- Approval for actions and decisions by Committee must be by a 5-3 vote. A vote of 4-4 would result in no action, decision or recommended changes.